In the Supreme Court

Appeal from the Court of Appeals
Honorable Michael J. Talbot

REBECCA GROSSMAN, as Personal Representative of the Estate of FRED GROSSMAN, deceased,

Plaintiff-Appellee,

v

Docket No. 122458

OTTO W. BROWN, M.D., SINAI HOSPITAL, an assumed name of SINAI HOSPITAL OF GREATER DETROIT, a Michigan non-profit corporation,

Defendants-Appellants,

and

ROBERT MURRAY, M.D.,

Defendant.

BRIEF ON APPEAL - APPELLANTS

*****ORAL ARGUMENT REQUESTED*****

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

JURISDICTIONAL STATEMENT

On June 6, 2002, Wayne County Circuit Court Judge Kaye Tertzag entered an order denying defendants' motion to strike plaintiff's affidavit of meritorious claim and for partial summary disposition. Defendants Otto W. Brown, M.D. and Sinai Hospital timely sought leave to appeal with the Court of Appeals. The Court of Appeals issued an order denying defendants' application for leave to appeal on September 12, 2002. These defendants thereafter timely filed an application for leave to appeal with this Court, which was granted by order entered on March 25, 2003. This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302.

STATEMENT OF QUESTIONS PRESENTED

I. **Whether plaintiff's expert is unqualified under MCL 600.2169 to sign the affidavit of merit required under MCL 600.2912d as plaintiff's expert did not specialize in nor is he board certified in the specialty of vascular surgery?**

Plaintiff argues the answer is "No."

Defendants Sinai Hospital and Dr. Brown submit the answer is "Yes."

The trial court held the answer is "No."

The Court of Appeals did not address the issue.

II. **Whether the trial court erroneously concluded that even if plaintiff's expert was "not qualified", it was reasonable for plaintiff to believe he was qualified?**

Plaintiff argues the answer is "No."

Defendants Sinai Hospital and Dr. Brown submit the answer is "Yes."

The trial court held the answer is "No."

The Court of Appeals did not address the issue.

III. **Whether dismissal with prejudice is appropriate as the statute of limitations as to Dr. Brown has expired?**

Plaintiff argues the answer is "No."

Defendants Sinai Hospital and Dr. Brown submit the answer is "Yes."

The trial court held the answer is "No."

The Court of Appeals did not address the issue.

STATEMENT OF FACTS

This appeal concerns the June 6, 2002 order of Wayne County Circuit Court Judge Kaye Tertzag denying these defendants' motion to strike the plaintiff's affidavit of meritorious claim and for partial summary disposition. Defendants sought dismissal of Dr. Brown and the allegations against Sinai Hospital based on Dr. Brown's care on the basis that plaintiff's affidavit of merit was not signed by a health care practitioner who specializes in the same specialty as defendant Dr. Brown and/or does not have a board certification in that specialty.

Background Facts

The plaintiff's decedent was a 70 year old man with multiple medical problems, unrelated to the claims of malpractice. These included hypertension, myocardial infarction, coronary artery disease with past bypass surgery, congestive heart failure (excessive fluid), insulin dependent diabetes mellitus, transient ischemic attack in 1996, and claudication of the lower extremities (limping and pain caused by blockage of artery) (Appendix p 26a). The complaint states that on or about November 7, 1997, Dr. Brown preformed a left carotid artery endarterectomy (surgical removal of the lining of the artery) as there was evidence of a 50 to 75 per cent stenosis (constriction or narrowing) of the left internal carotid artery (Appendix p 5a, ¶¶ 9 & 10). The complaint further states that at approximately noon on November 7, 1997, the decedent returned to the operating room due to excessive post-operative bleeding, that he was transferred to the surgical intensive care unit and continued to exhibit bradycardia (slowness of heart action), as well as a continual decline in hemoglobin and hematocrit count (Appendix p 6a, ¶ 20-21). On November 9, 1997, the decedent became unresponsive and subsequently died on November 10, 1997 (Appendix p 7a, ¶ 28, 31). It is plaintiff's claim, as stated in the complaint, that Sinai Hospital is vicariously liable for the acts of Dr. Brown, and that Dr. Brown, as a specialist in the field of vascular surgery (Appendix p 8a, ¶ 36), was negligent

in the care and treatment rendered to the decedent (Appendix pp 8a-9a, ¶ 37).[1]

With the complaint, plaintiff filed an affidavit of merit signed by a health care practitioner board certified by the American Board of Surgery and by the American Board of Thoracic Surgery, Dr. Alex Zakharia. This expert, however, is not a vascular surgeon.

Motion to Strike and for Partial Summary Disposition

Defendants Sinai Hospital and Otto W. Brown, M.D. moved for summary disposition on or about August 21, 2001 on the basis that the affidavit of merit filed with the complaint to support the allegations regarding treatment by Dr. Brown was not signed by an expert qualified under MCL 600.2169 (Appendix p 23a). Dr. Brown is board certified by the American Board of Surgery (Appendix pp 124a-125a). Dr. Brown has an additional certification in Vascular Surgery (Appendix pp 116a-117a; 124a-125a). In contrast, plaintiff's expert, Dr. Alex Zakharia, is board certified in surgery but not in the additional specialty of vascular surgery. (Dr. Zakharia has a separate board certification in thoracic surgery) (Appendix p 84a). Defendants sought dismissal on the basis that the affidavit of merit was not signed by an expert who was qualified under MCL 600.2169 and, thus, the affidavit did not meet the requirements of MCL 600.2912d.

In response, plaintiff argued that since Dr. Zakharia was board certified by the American Board of Surgery, as well as by the American Board of Thoracic Surgery, his specialization and certification qualifications were sufficient to meet the standards that apply in MCL 600.2169 (Appendix p 76a). Further, plaintiff requested that, in the event the court found that her expert was not qualified, that she be given additional time to secure an affidavit signed by a qualified vascular surgery expert (Appendix p 81a).[2]

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1 Plaintiff also alleges negligence by Dr. Robert Murray, an anesthesiologist (see complaint). These claims were not the subject of the defendants' motion to strike the affidavit and/or for partial summary disposition.

2 Plaintiff did not file an affidavit of meritorious claim signed by a vascular surgeon.

Two hearings were held on the motion. The first hearing was conducted on October 19, 2001. At that hearing, the trial court took the matter under advisement, allowing additional briefing on the certification issue (Appendix p 176a). Defendants filed a supplemental brief attaching numerous exhibits evidencing the difference between the specialty boards and certification requirements of vascular surgery and thoracic surgery, including: Dr. Brown's certificates for Vascular Surgery issued in 1984 and 1994; a Newsletter of the "Vascular Surgery Board of the American Board of Surgery"; an affidavit of Dr. Brown; a booklet of information from the American Board of Thoracic Surgery; a booklet from the American Board of Surgery regarding "Certification in Vascular Surgery"; a booklet of information from the American Board of Surgery, Inc; and an excerpt from the Journal of Vascular Surgery (Appendix p 101a). Plaintiff also filed a supplemental brief which attached as exhibits a list of the ABMS approved specialities and specialties, an apparent print-out from the American Board of Surgery website, and an affidavit of Ari Berris (Appendix p 89a)[3].

A second hearing was conducted on December 4, 2001. At that time, the trial court denied the motion to strike and/or for partial summary disposition, concluding that Dr. Zakharia's board certification in surgery was sufficient to meet the requirements of MCL 600.2169 (Appendix p 188a). The trial court held that "sub-speciality" certification was not necessary and that plaintiff's expert was qualified and that, regardless, plaintiff had a reasonable belief that the doctor met the qualifications of section 2169:

> In any event, having had an opportunity to read the motions, the supplements to the motions and the briefs and supplements to the briefs on either side, having had the opportunity to hear oral argument, I am going to deny the motion and I am going to adopt the plaintiff's brief and oral argument as the basis for my decision on two prongs or two bases. One on the first issue that Mr. Meklir raised concerning whether he is qualified, that is, Dr. Zakharia is qualified; and secondly, the court having had an opportunity

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[3] Defendants believe Mr. Berris is or was a member of plaintiff's law firm.

> now to read all the materials is satisfied that under MCL 600.2912(d) counsel had a reasonable belief that the doctor met the qualifications of the act. [Appendix p 188a.]

Court of Appeal Proceedings

On June 27, 2002 defendants Dr. Brown and Sinai Hospital timely filed an application for leave to appeal with the Michigan Court of Appeals. Subsequently, on September 12, 2002 the Court of Appeals issued an order denying the application for leave to appeal on the basis that the court was not persuaded that there was a need for immediate appellate review.

Supreme Court Proceedings

On October 3, 2002, defendants filed an application for leave to appeal with this Court. Defendants subsequently filed a motion for immediate consideration and a motion for stay of trial. On January 24, 2003, this Court issued an order granting the motion for immediate consideration and the motion for stay, indicating that the application remained under consideration.

On March 25, 2003, the Court issued a second order granting the application limited to the following issues:

> (1) whether a standard of care expert witness is qualified under MCL 600.2169(1)(a) to present expert testimony against a defendant physician where the proffered witness does not possess the same certificate of special qualifications as the defendant physician; (2) the proper construction of the word "specialty" in the first sentence of MCL 600.2169(1)(a); and (3) the proper construction of the phrase "that specialty" in the second sentence of MCL 600.2169(1)(a); and (4) whether the circuit court erred in denying the defendants' motions to strike and for partial summary disposition.

SUMMARY OF THE ARGUMENTS

The affidavit of merit filed with the complaint by plaintiff does not satisfy the expert witness qualification requirements in MCL 600.2169. Plaintiff's expert is rendering testimony against these defendants as to the care provided by Otto W. Brown, M.D. Dr. Brown is board certified by the American Board of Surgery in both surgery and vascular surgery. However, plaintiff's proposed expert, while board certified in surgery, does not specialize in nor hold board certification in vascular surgery. Thus, this expert's qualifications do not match those of the health care provider against whom the expert is rendering testimony. As such, plaintiff's proffered expert is not qualified to testify under MCL 600.2169. Thus, the affidavit of merit signed by this expert was not sufficient to commence this medical malpractice action.

Further, as there was no evidence presented to the trial court upon which to base the finding that the plaintiff's attorney reasonably believed at the time the affidavit of merit was filed that his expert was qualified to criticize a vascular surgeon, the complaint claims based on the care provided by Dr. Brown should have been dismissed. Further, since the statute of limitations has expired and the affidavit of merit deficiency was never corrected, Dr. Brown should have been dismissed with prejudice.

ARGUMENTS

I. Plaintiff's expert is not qualified under MCL 600.2169 to sign the affidavit of merit required under MCL 600.2912d as plaintiff's expert did not specialize in nor is he board certified in the specialty of vascular surgery.

Plaintiff failed to file an affidavit of meritorious claim signed by an expert who meets the specialization and board certification requirements of MCL 600.2169. Dr. Brown is board certificated by the American Board of Surgery in surgery, as well as in vascular surgery. Plaintiff's expert, however, while board certified in surgery, does not specialize in nor hold the added certification in vascular surgery. While this expert holds a certification in thoracic surgery, under the current expert qualification statute there must be a precise match of specialties. Certification or practice in a "related" area of medicine is no longer sufficient. Thus, plaintiff's expert was and is unqualified to sign the affidavit of merit.

A. Standard of review.

The granting of a motion for summary disposition, as well as issues of statutory construction are reviewed *de novo*. Herald Co v City of Bay City, 463 Mich 111, 117; 614 NW2d 873 (2000).

B. Introduction to the 1993 tort reform legislation.

In 1993, the Legislature enacted provisions amending the Revised Judicature Act, impacting on medical malpractice litigation designed to reduce liability costs and increase availability of health care while at the same time improving patient care and physician accountability in order to reduce malpractice.[4] See 1993 PA 78. In this Act, the Legislature amended the Revised Judicature Act to establish an integrated series of

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[4] The latter was accomplished through the so-called "Physician Discipline Package," several bills which were "tie-barred" to the 1993 Tort Reform provisions. See 1993 PA 79-87, tie-barred to 1993 PA 78, pursuant to 1993 PA 78 Sec. 5.

requirements for medical malpractice actions. First, the Legislature in MCL 600.2912b declared that prior to commencing an action alleging medical malpractice against a health care provider, the claimant/plaintiff must first provide written notice of intent to bring such a lawsuit not less than 182 days before the action is commenced.

If the claim is not resolved and the plaintiff elects to pursue the matter further, the Legislature has provided in MCL 600.2912d that the plaintiff must file with the complaint an "affidavit of merit". The plaintiff's affidavit of merit must be signed by a health care professional whom the plaintiff's attorney reasonably believes meets the requirements for an expert witness in medical malpractice actions set forth in section 2169 of the Act, MCL 600.2169. This statute requires among others that the proffered expert specialize at the time of the occurrence, as well as devote in the year immediately proceeding a majority of his or her professional time in the same specialty as the health care provider against whom the expert is offering testimony. If the health care provider is board certified in that specialty, the expert must also be so certified.[5]

In the affidavit, the health professional must describe the applicable standard of practice, state the professional's opinion that the standard of practice has been breached, and state the manner in which this breach was a proximate cause of the injury alleged in the notice of intent. MCL 600.2912d(1)(a)-(d).

The healthcare provider likewise is required to file an "affidavit of meritorious defense." MCL 600.2912e. This must also be signed by a health professional meeting the requirements of section 2169 and must state the factual basis for the defenses, the standard of practice, and the manner in which the alleged injury is not related to the care or treatment rendered.

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[5] The prior version of section 2169 only required that the expert specialize in the same or a related, relevant area of medicine and surgery as the specialist who was the defendant.

Thus, during the six month pre-suit notice period, the plaintiff has the obligation to find appropriate and qualified healthcare provider experts, who specialize in and are board certified in the same fields as the defendants named in the written notice, to substantiate the allegations of negligence eventually to be set forth in affidavits of merits which must be filed with the complaint. Both this Court and the Court of Appeals have held that a failure to file a proper affidavit of meritorious claim requires a dismissal of the complaint. See Dorris v Detroit Osteopathic Hosp Corp, 460 Mich 26; 594 NW2d 455 (1999) and VandenBerg v VandenBerg, 231 Mich App 497; 586 NW2d 570 (1998). In Scarsella v Pollak, 461 Mich 547; 607 NW2d 711 (2000), this Court held that a medical malpractice complaint was properly dismissed with prejudice where the plaintiff failed to file an affidavit of merit before the expiration of the statute of limitations.

C. The expert witness statute requires a precise match of specialties as well as that the expert devote a majority of his professional time to that specialty.

Before expert testimony is admissible, the plaintiff must establish that the expert meets the requirements of MCL 600.2169. This Court, in the companion cases of McDougall v Schanz and Sobran v McKendrick, 461 Mich 15; 597 NW2d 148 (1999) upheld as constitutional the expert qualification provision in section 2169.

MCL 600.2169 provides that an expert may not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this State or another State, and if the party against whom the testimony is offered is a specialist, the proposed expert must specialize at the time of the occurrence that is the basis for the action in the same specialty as the party against whom the testimony is offered. Further, if the defendant is board certified in a specialty or specialties, the expert must also be board certified in that specialty. MCL 600.2169 provides, in pertinent part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate

standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action **in the same specialty as** the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness **must be a specialist who is board certified in that specialty**. [Emphasis added.]

Further section 2169 requires that the expert, even if board certified in the same specialty, devote in the year immediately preceding the claim that is the basis for the complaint a majority of his or her professional time in that specialty:

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

D. Dr. Brown specializes in "Vascular Surgery" and is also board certified in that speciality.

The medical malpractice allegations addressed in this application concern the care rendered by Dr. Brown in the field of vascular surgery. The complaint alleges that "DR. OTTO BROWN, at all times pertinent hereto, was engaged and held himself out to the public as a specialist in the field of vascular surgery, and that he, therefore, owed a duty to plaintiff, FRED GROSSMAN, Deceased, to provide him with the recognized standard of practice or care within that specialty . . . ." (Appendix pp 4a, ¶ 2 and 8a, ¶ 36). Thus, plaintiff's complaint acknowledges and recognizes the specialty of vascular surgery and that Dr. Brown was practicing in that specialty.

As the exhibits submitted by defendants indisputably establish, Dr. Brown is a board certified surgeon with an additional board certification in the specialty of vascular surgery (Appendix pp 116a & 117a). In this affidavit, submitted in support of the motion to strike and for partial summary disposition, Dr. Brown attests that he is "a licensed physician specializing in the area of vascular surgery," that he "completed a fellowship in the specialty of vascular surgery," that he has "been board certified in the specialty of vascular surgery since 1984" by the American Board of Surgery and that he "obtained recertification in 1994 in this speciality again" by the American Board of Surgery (Appendix pp 124a-125a). Further, Dr. Brown states in his affidavit that "[s]imply maintaining board certification in general surgery is not recognized . . . as a certification allowing specialization in vascular surgery" and that "[t]he requirements for Certification in Vascular Surgery are specifically set forth by the American Board of Surgery and are different than the requirements for certification by the American Board of Thoracic Surgery" (Appendix p 125a, ¶ 5). Finally, Dr. Brown states that "[v]ascular surgery, thoracic surgery and general surgery are not interchangeable specialties" (Appendix p 125, ¶ 6).

E. Vascular Surgery is a separate specialty recognized by the American Board of Medical Specialists and by the American Board of Surgery for which qualified applicants can receive certification by the American Board of Surgery.

Although vascular surgery is a specialty of surgery, it is a separate "specialty." The American Board of Surgery Booklet of Information for July 2001 to June 2002 lists vascular surgery as a separate specialty (Appendix p 145a). That official booklet provides that certification may be granted in surgical specialities:

> The Board has been authorized by the American Board of Medical Specialities to award Certification in certain disciplines related to the overall specialty of Surgery, to those Diplomates of this Board who meet the defined requirements. These disciplines include Vascular Surgery, Pediatric Surgery, Surgery of the Hand, and Surgical Critical Care.
>
> Those seeking Subspecialty Certification by the American Board of Surgery must have a currently valid Certificate in Surgery issued by the Board; must have completed the required additional education in the discipline beyond that required for General Certification; must demonstrate operative experience and/or patient care data acceptable to the Board; must show evidence of dedication to the discipline by the means specified by the Board; must receive favorable endorsement by the Director of the Residency Program in the particular discipline. Finally, successful completion of the prescribed examinations is required. [Appendix p 157a.]

In the Informational Booklet addressing certification in Vascular Surgery issued by the American Board of Surgery, vascular surgery is defined as a separate specialty:

> The definition of "VASCULAR SURGERY", as approved by the American Board of Medical Specialties is: "*surgery of the arterial, venous and lymphatic systems, exclusive of the intracranial vessels and those vessels intrinsic to and immediately adjacent to the heart.*" [Appendix p 139a]

While board certification in "surgery" encompasses vascular surgery as one of its nine primary components, the Board of Surgery, in issuing a separate certification in Vascular Surgery, expressly indicates its intent to limit the additional certification in vascular surgery to those who have attained additional training in that area and have demonstrated qualifications above those of general or thoracic surgeons:

> The definition of Surgery adopted by the Board includes Vascular Surgery as one of the nine primary components of the Specialty. Thus, properly educated surgeons who are Diplomates of the American Board of Surgery or the American Board of Thoracic Surgery are expected to possess qualifications in Vascular Surgery, just as they should in surgery of the alimentary tract, the abdomen, the breast, the endocrine system, trauma, etc. One's initial Certification in Surgery attests to such qualifications. **The Board therefore intends Certification in Vascular Surgery of only those who, by virtue of additional training, dedicated practice characteristics and contributions to this discipline, have demonstrated qualifications which are indeed above and beyond those expected of other Certified General or Thoracic Surgeons**. [Appendix pp 139a-140a; emphasis added.]

Further the American Board of Surgery booklet provides that certification in the specialty of vascular surgery will be issued by the Board attesting to the candidates qualifications in that area:

> A candidate who has met all requirements and has successfully completed the examinations of the American Board of Surgery in one or another of the areas of Certification will then be issued a Certificate by this Board, signed by its Officers, attesting to qualifications in that area.
>
> The Board issues Certificates in Surgery, Vascular Surgery, Pediatric Surgery, Surgery of the Hand, and in Surgical Critical Care. [Appendix p 158a.]

Thus, the Board of Surgery defines "vascular surgery" (as well as pediatric, hand and critical care surgery) as separate areas of specializations for which separate board certifications are allowed. Further, in the section directly quoted above, the Board of Surgery lists certificates in **"surgery"** equally and in the same sentence as certificates in vascular surgery, pediatric surgery, surgery of the hand and surgical critical care: "The Board issues **Certificates in Surgery, Vascular Surgery**, Pediatric Surgery, Surgery of the Hand, and in Surgical Critical Care" (Appendix p 158a; emphasis added).

Moreover, there is in fact a "Vascular Surgery Board of the American Board of Surgery." In the Informational Booklet of the American Board of Surgery on Certification in Vascular Surgery, the American Board of Surgery has delegated the responsibility for

granting Certification in Vascular Surgery to the Vascular Surgery Sub-Board:

> The Qualifying Examination is developed by the Vascular Surgery Sub-Board of the American Board of Surgery. It is a written examination of multiple- choice questions which is administered at designated centers in the United States each fall. A pamphlet describing the examination will be routinely sent to those applicants meeting the state requirements whose formal application have been approved.
>
> Candidates who successfully complete the written examination will be admissible to the Certifying (oral) Examination. [Appendix p 140a.]

In the Newsletter of the Vascular Surgery Board of the American Board of Surgery, submitted by defendants in support of the motion to strike and for partial summary disposition, the Vascular Surgery Board indicated that it went through a name change in January 2000:

> At its January meeting, the Directors of the ABS voted unanimously to change the name of the ABS Vascular Surgery Sub-Board to the Vascular Surgery Board of the ABS. The Directors felt that the new name would more accurately and appropriately reflect the function of the group. The Vascular Surgery Board has taken the lead in assuming operational authority over all matters pertaining to the education and certification of vascular surgeons. [Appendix p 118a.]

The training requirements and competency requirements for vascular surgeons who attain the level of board certification by the American Board of Surgery are outlined in specific detail:

> The requirements which must be met for Certification in Vascular Surgery are:
>
> A. Must be a Diplomat of the American Board of Surgery.
>
> B. Must have a current license to practice medicine in the United States or Canada.
>
> C. Must have ethical standing in the profession and moral status in the community acceptable to the board.
>
> D. Must have satisfactorily completed a program accredited by the accreditation counsel for graduate

> medical education in vascular surgery. [Appendix p 140a].

As noted above, the candidate for certification must successfully complete a qualifying examination and a certifying examination. The examination is developed by the Vascular Surgery Board of the American Board of Surgery. The requirements for the certifying examination are:

> The requirements which must be met to be admitted to the Certifying Examination in Vascular Surgery are:
>
> A. Successful completion of the Qualifying Examination.
>
> B. Documentation of a major commitment and dedication to Vascular Surgery by documentation of the major vascular reconstructive procedures, involving an acceptable spectrum of relevant areas since completion of an accredited program in Vascular Surgery.
>
> C. Additional evidence of commitment to Vascular Surgery, as available.
>
> Upon successful completion of the Qualifying Examination, the candidate will receive from the Board an operative experience list on which is to be tabulated the cases which have been performed *after* completion of the Fellowship. This form must be completed precisely and returned to the Board no later than March 1st, in order to be admitted to the Certifying Examination which will be given annually in late spring or early summer. [Appendix pp 140a-141a; emphasis in original.]

Further, in the Journal of Vascular Surgery issued in May of 1984, the President of the Midwestern Vascular Surgical Society outlined the history of the development for separate certification in vascular surgery and the goal for better trained and experienced surgeons in the area of vascular surgery (Appendix p 162a).

F. Where a term is not defined in a statute, words are to be given their plain and ordinary meaning.

The issues as stated by this Court in its March 25, 2003 order granting leave are, among others, "the proper construction of the word "specialty" in the first sentence of MCL

600.2169(1)(a)" and "the proper construction of the phrase "that specialty" in the second sentence of MCL 600.2169(1)(a)."

This Court recently restated the general rules of statutory construction in People v McIntire, 461 Mich 147, 152-153; 599 NW2d 102 (1999) as follows:

> Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." When the legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case. Finally, in construing a statute, we must give the words used by the Legislature their common, ordinary meaning. [Citations omitted.]

MCL 600.2169 does not define the term specialist or board certification. However, it is well established, as noted, above that ordinary words are given their plain and ordinary meaning. See Herald Co, supra at 118; 467 Mich 288, 290; 651 NW2d 64 (2002). Where a statute does not define one of its terms, the Court may look to the dictionary for aid in "construing those terms in accordance with their ordinary and generally accepted meanings." People v Morey, 461 Mich 325, 330; 603 NW2d 250 (1999); In re Certified Question, ___ Mich ___ ; 659 NW2d 597 (2003).

A specialist is defined in Webster's II New College Dictionary (1999), p 1059 as, among others:

> 1.a. One who has devoted oneself to a particular branch of study or research. b. A physician certified to practice in a specified field.

Specialty is defined as, among others:

> 1. A special occupation, pursuit, aptitude, or skill. 2. A branch of medicine, as pediatrics, to which a physician confines his or her practice. [Id. at 1060.]

In The Merriam-Webster Dictionary (1974), p 659, specialist is defined as follows:

> 1. one who devotes himself to some special branch of learning or activity.

Further, specialty is defined as:

> 1. particular quality or detail. 2: a product of a special kind or of special excellence. 3: a branch of knowledge, business or professional work in which one specializes. [Id. at p.660.]

Similarly, the medical dictionaries define "specialty" as:

> The particular subject area or branch of medical science to which one devotes professional attention. [Stedman's Medical Dictionary, 27th Edition (2000), p 1663.]
>
> The field of practice of a specialist. [Dorland's Illustrated Medical Dictionary, 29th Edition (2000), p 1670.]

Specialist is defined:

> A physician whose practice is limited to a particular branch of medicine or surgery especially one who, by virtue of advance training, is certified by a specialty board as being qualified to so limit his practice. [Dorland's Illustrated Medical Dictionary, 29th Edition (2000), p 1670.]

Merriam Webster's Medical Desk Dictionary (1996), p 755, defines specialists as:

> a medical practitioner whose practice is limited to a particular class of patients (as children) or of diseases (as skin disease) or of technique (as surgery); esp: a physician who is qualified by advanced training and certification by a specialty examining board to so limit his or her practice.

In Cox v Board of Hosp Managers for the City of Flint, 467 Mich 1; 651 NW2d 356 (2002), this Court examined the meaning of specialist in the context of MCL 600.2912a. In that case, this Court also looked to the dictionary definition for guidance, stating:

> *Random House Webster's College Dictionary* (1997) defines "general practitioner" as "a medical practitioner whose practice is not limited to any specific branch of medicine." "Specialist" is defined as "a medical practitioner who deals only with a particular class of diseases, conditions, patients, etc." [467 Mich at 18 -19.]

In addition, the dictionaries provide guidance as to the plain and ordinary meaning to the term "board" and "certify." Board is defined in Webster's II New College Dictionary

(1999), p 123 as, among others: "An organized body of administrators or investigators." Certify is defined as: "To guarantee as meeting a standard" or "[t]o issue a license or certification to." Id. at 183.

In The Merriam-Webster Dictionary (1974), p 90, board is defined as: "a group or association of persons organized for a special responsibility." Certify or certified is defined as "verify, confirm" or "to endorse officially." Id. at 127.

Stedman's Medical Dictionary, 27th Edition (2000), p 107, defines board certification as:

> The process by which a person is tested and approved to practice in a specialty field, especially medicine, after successfully completing the requirements of a board of specialists in that field. For a physician, board certification is required in order to practice in a hospital.

Merriam Webster's Medical Desk Dictionary (1996), p 92, defines board-certified as:

> being a physician who has graduated from medical school, completed residency, trained under supervision in a specialty, and passed a qualifying exam given by a medical specialty board.

Further, other statutory acts provide guidance. Under the statutory construction rule of *in pari materia*, it is proper to look to the definition used by the Legislature for an undefined term in another statute which serves a common purpose. See Lindsey v Harper Hospital, 455 Mich 56, 65; 564 NW2d 861 (1997).

Board certification has been addressed by the Legislature in MCL 500.2212a(1)(i), in the context of chapters 34 and 36 of the Insurance Code. These chapters pertain to disability insurance policies and group and blanket disability insurance. Section 2212a(1)(i) provides:

> "Board certified" means certified to practice in a particular medical or other health professional society by the American Board of Medical Specialties or another appropriate national health professional association.

In the Michigan Essential Health Providers Recruitment Strategy Act, MCL 333.2701 et seq, "board certified" is defined in MCL 333.2701(a) as:

> "Board certified" means certified to practice in a particular medical specialty by a national board recognized by the American board of medical specialties or the American osteopathic association.

G. Under the first sentence of MCL 600.2169, plaintiff's expert must specialize in vascular surgery to be qualified to sign the affidavit of merit.

The first sentence of MCL 600.2169(1)(a) provides, in pertinent part, that "if the party against whom or on whose behalf the testimony is offered is a specialist" the expert must "specialize at the time of the occurrence that is the basis for the action *in the same specialty* as the party against whom or on whose behalf the testimony is offered" (emphasis added). The practice of medicine in vascular surgery is a "specialty" as used in section 2169. In the prior version of section 2169 before the adoption of the 1993 tort reform act, an expert was qualified if he or she specialized in the same specialty or **"a related, relevant area of medicine**." In McClellan v Collar, 240 Mich App 403, 410 ; 613 NW2d 729 (2000), the Court of Appeals concluded that use of the term "related, relevant", evidenced a legislative intent that the expert was not required to specialize and practice in the same specialty as the defendant. However, in the 1993 amendment to section 2169, the Legislature intentionally removed the phrase "related, relevant area of medicine" and required that the proffered expert "specialize" in the same specialty as the health care professional against who he or she is rendering testimony.

Dr. Brown, as with all vascular surgeons, "devotes" himself to the practice of surgery of arterial, venous and lymphatic systems. Vascular surgery, as the above documentation illustrates, is "a branch of knowledge or professional work in which one specializes." A vascular surgeon is a physician whose practice is limited to surgery of the arterial venous and lymphatic systems. A vascular surgeon is "a medical practitioner who deals only with a particular class of diseases, conditions, patients, etc." Cox, supra. By

virtue of advanced training, a vascular surgeon, such as Dr. Brown, is certified by the Board of Surgery as being qualified to limit his practice to vascular surgery.

Even the complaint allegations acknowledged the area of speciality known as vascular surgery. In the complaint, plaintiff stated that Dr. Brown "was engaged and held himself out to the public as a specialist in the field of vascular surgery, and that he, therefore, owed a duty to plaintiff . . . . to provide him with the recognized standard of practice or care within that specialty" (Appendix p 8a, ¶ 36).

There is no requirement in section 2169 that "specialist" as used in the statute is limited to the general specialities listed by the American Board of Medical Specialist (ABMS). The common, ordinary meaning of "specialist" as used by both lay and medical dictionaries does not so limit the term. The common understanding of both medical and lay people is that there are additional specialties within general specialties (such as cardiology, a subspecialty of internal medicine; endocrinology, diabetes & metabolism, a subspecialty of internal medicine; medical oncology, a subspecialty of internal medicine; maternal-fetal medicine, a subspecialty of obstetrics & gynecology; or neonatal-perinatal medicine, a subspecialty of pediatrics) (Appendix p 95a).

H. Plaintiff's expert is not a vascular surgery but a general surgeon and thoracic surgeon.

Since plaintiff's expert is not a specialist in the area of vascular surgery, this Court need go no further. Under the first sentence of MCL 600.2169(1)(a), plaintiff's expert is not qualified.

The affidavit filed with the complaint was signed by Dr. Alex Zakharia, a surgeon and thoracic surgeon. Thoracic surgery is a separate specialty whose certification is granted by the Board of Thoracic Surgery. The definition of thoracic surgery practiced by Dr. Zakharia is distinguished from the practice of vascular surgery. For the purposes of Dr. Zakharia's practice in thoracic surgery, he is expected to have competence in the operative, perioperative, and surgical critical care of patients with acquired and

pathological conditions **within the chest** (Appendix p 131a, The American Board of Thoracic Surgery Booklet of Information, January, 2001.)

The curriculum vitae of Dr. Zakharia, attached by plaintiff to her response brief, acknowledges the separate specialty of thoracic surgery. This CV states under "Professional Experience" on page 4 that from September 1985 to the present, Dr. Zakharia has a "Cardiovascular and Thoracic Surgery Practice" (Appendix p 87a). By using the terms of "cardiovascular" and "thoracic" surgery, Dr. Zakharia himself categorizes himself as a thoracic surgeon. Vascular surgery as defined above by the American Board of Surgery provides that its area is "exclusive of the vessels intrinsic to and immediately adjacent to the heart" (Appendix p 139a). Thus, as defined by the Boards of Surgery and Thoracic Surgery themselves, vascular surgery is different and distinct from thoracic surgery.

I. The second sentence of section 2169(1)(a) requires that if the defendant is board certified that the expert also be board certified in "that specialty."

This Court also requested that the parties address the proper construction of the phrase "that specialty" in the second sentence of MCL 600.2169(1)(a). Defendants submit that under this sentence, plaintiff's expert had to obtain board certification by the American Board of Surgery in Vascular Surgery to be qualified to the sign the affidavit of merit. The second sentence of MCL 600.2169(1)(a) states:

> However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

This provision of section 2169 simply states that if the defendant is a specialist who has received certification from "a board" in "that specialty", the expert must also be so certified to render testimony against him. In the case of the speciality of vascular surgery, certification is provided for by The American Board of Surgery. Thus, there is board certification in the specialty of vascular surgery. While plaintiff's expert and Dr. Brown are

both board certified in surgery, Dr. Brown specializes in and is board certified in Vascular Surgery. Thus, plaintiff's proffered expert must also have secured the additional certification in vascular surgery.

The informational booklet published by The American Board of Surgery regarding the speciality of vascular surgery states on its face "Certification in Vascular Surgery" (Appendix p 138a). Thus, The American Board of Surgery issues a certification in this specialty. Under the heading of "General Information" on page 1, The American Board of Surgery states that it "has been granted approval to award a CERTIFICATE IN VASCULAR SURGERY." The term certification is used throughout the booklet, including under the hearing "Certification" wherein it states that "Candidates who have met all the requirements and have successfully completed the examinations in Vascular Surgery will be issued a Certificate by The American Board of Surgery, signed by its Officers, attesting to their Certification in Vascular Surgery" (Appendix p 142a).

Similarly, in the Booklet of Information issued by The American Board of Surgery, Inc, The American Board of Surgery again uses the term "certification" and "surgical specialties" under the heading "Certification in Surgical Specialties" and states:

> The Board has been authorized by the American Board of Medical Specialities to award Certification in certain disciplines related to the overall specialty of Surgery, to those Diplomates of the Board who meet the defined requirements. These disciplines include Vascular Surgery, Pediatric Surgery, Surgery of the Hand and Surgical Critical Care." [Appendix p 157a.]

As the certificates of Dr. Brown (Appendix pp 116a-117a) evidence, he passed the required examinations to be certified in "Vascular Surgery". The certificate issued in 1984 reads in pertinent part: "OTTO WILLIAM BROWN having satisfied all the requirements and successfully passed the examination is **certified** as having special qualifications in General Vascular Surgery" (emphasis added). The certificate of re-certification issued in 1994 contains similar "certification" language (Appendix p 117a).

In Dr. Brown's affidavit, he states he has been board certified in the specialty of vascular surgery since 1984 by the American Board of Surgeons and that "certification of vascular surgeons is conducted by the Vascular Surgery Board of the American Board of Surgery" (Appendix pp 124a-125a). In the "Newsletter" of the Vascular Surgery Board of The American Board of Surgery, the Vascular Surgery Board states under the column "A New Name" that it "has taken the lead in assuming operation authority over all matters pertaining to the education and certification of vascular surgeons" (Appendix p 118a).

Defendants submit that the language of section 2169 clearly and unambiguously requires that the expert be "board certified" in the same specialties as the health care provider, and that such includes the specialty of vascular surgery. The statute simply states that if the party against whom the testimony is offered is a board certified specialist, the expert witness "must be a specialist who is board certified in that specialty." Here, Dr. Brown received certification by The American Board of Surgery in both surgery and the additional speciality of vascular surgery. The statute's phrase "that specialty" includes vascular surgery.

J. Plaintiff's expert is not board certified in vascular surgery.

By virtue of advanced training and experience, and successful completion of a written examination, Dr. Brown has met the requirements for board certification in the specialty of vascular surgery. However, plaintiff's expert, Dr. Zakharia, is not certified by The American Board of Surgery as a vascular surgeon. There is no dispute that Dr. Zakharia has not been certified in vascular surgery. Thus, Dr. Zakharia's qualifications do not satisfy the second sentence of section 2169(1)(a).

K. Conclusion

Section 2169 clearly and unambiguously provides that the expert's qualifications must match those of the health professional against whom he is rendering criticisms and that the expert must be board certified in the specialty or specialties of the defendant if the

defendant is board certified. There is no statement in section 2169 that such a board certification requirement must only "match" a primary specialty. Further, since certification is issued by the American Board of Surgery there is in fact "board certification" for the specialty of vascular surgery. The statute requires that the expert specialize at the time of the occurrence in the same specialty as the party against whom the testimony is offered, and if the defendant is board certified, the expert must also be "board certified in that specialty." Plaintiff's expert fails to satisfy the clear and unambiguous requirements of MCL 600.2169 (1)(a).

II. The trial court erroneously concluded that even if plaintiff's expert was "not qualified", it was reasonable for plaintiff to believe he was qualified.

There was no evidence presented to the trial court at the time of the motion to strike and for partial summary disposition to establish that plaintiff could reasonably have believed that her proffered expert was qualified to testify against a vascular surgeon. As such the motion to strike and for summary disposition should have been granted.

A. Standard of review.

The granting of a motion for summary disposition, as well as issues of statutory construction are reviewed *de novo*. Herald Co v City of Bay City, 463 Mich 111, 117; 614 NW2d 873 (2000).

B. Little, if anything, was provided by plaintiff to establish the existence of a reasonable belief at the time the affidavit was filed that the expert was qualified.

The trial court concluded that even if the expert is not qualified, that plaintiff was reasonable in her belief that the expert was qualified under MCL 600.2169. However, a review of the pleadings filed below reveal that little, if anything, was provided by plaintiff to establish a "reasonable" belief at the time the affidavit was filed. Clearly more should be and is required than simply a statement that the attorney thought the expert was qualified. Evidence of some investigation should have been provided, not only as to the

speciality of the expert but also the speciality of the defendant doctor.

In the six month presuit notice period, the plaintiff is allowed ample time to investigate his claim and secure the necessary expert review. Here the complaint allegations themselves identify the specialty of Dr. Brown as a vascular surgeon. Nonetheless, plaintiff's expert is not a vascular surgeon. As noted above, the complaint alleges that Dr. Brown was "engaged and held himself out to the public as a specialist in the field of vascular surgery" and that he owed a duty to the decedent to provide "the recognized standard of practice or care within that speciality . . . ." (Appendix pp 4a, ¶ 2 and 8a, ¶ 36). Even the expert's curriculum vitae, attached by plaintiff to her brief in response to the summary disposition motion, only identifies the expert as practicing "cardiovascular and thoracic surgery" - not vascular surgery (Appendix p 87a).

Plaintiff did not argue in her initial reply that her attorney "reasonably" believed that the expert was qualified under section 2169, but instead simply asked for more time to secure the appropriate affidavit if the expert was deemed unqualified (Appendix p 81a).[6] In a supplemental brief filed after the October 19, 2001 hearing, plaintiff argued that a reasonable belief existed as both the expert and Dr. Brown are general surgeons, that plaintiff's expert allegedly practices vascular surgery, that the expert allegedly advised that merely a certificate of special qualification exists for vascular surgery and that even if some sort of certification existed the expert would be "grandfathered" in. However, no evidence, by affidavit from either the expert or the attorney, was provided to the trial court to establish and/or to support such assertions or that such was considered or believed at

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[6] No such affidavit was filed.

the time the affidavit was filed.(Appendix p 89a).[7]

Defendants submit that the relevant inquiry is what plaintiff's counsel believed at the time the affidavit of merit was filed, not at the time the motion was filed or at the time of the appeal. MCL 600.2912d states in relevant part:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the **plaintiff's attorney reasonably believes meets the requirements** for an expert witness under section 2169.

Under the clear and unambiguous language of section 2912d(1), the attorney must reasonably believe, at the time the complaint and affidavit are filed, that the expert is qualified under MCL 600.2169. The use of a verb tense is considered significant when construing statutes. See United States v Wilson, 503 US 329, 333; 112 S Ct 1351; 117 L Ed 2d 593 (1992); Des Jardin v Lynn, 6 Mich App 439, 442; 149 NW2d 228 (1967). The statute clearly and unambiguously provides that the plaintiff "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably **believes meets** the requirements" under MCL 600.2169. Thus, the pertinent time inquiry is what was believed at the time the complaint and affidavit of merit was filed.

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[7] In her response to the Court of Appeals application, plaintiff attached unsigned affidavits, deposition transcripts (that were conducted in 2002, long after the filing of the complaint and/or the lower court hearing) and what appears to be printouts from the internet that were not presented to the trial court. In the event that such documents are presented with plaintiff's appeal brief or in an appellee appendix, defendants request that such documents be stricken as an improper attempt to enlarge the record on appeal. See Amerollo v Monsanto Corp, 186 Mich App 324; 463 NW2d 487 (1990) (plaintiff's references to documents not presented to the trial court cannot be considered by the Court of Appeals); Trail Clinic, P.C. v Bloch, 114 Mich App 700; 319 NW2d 638 (1982) (evidence that the plaintiff sued the wrong party, which is not part of the record, cannot be presented on appeal).

At the time of the hearings on the motion to strike and for partial summary disposition before the trial court, plaintiff's counsel failed to present any evidence upon which to determine that he "reasonably believed" at the time the affidavit of merit was filed that he had investigated the status of his expert or that there was any information to base a belief that the expert specialized in or was board certified in vascular surgery. Rather, plaintiff's attorney's argument was simply that he believed, under MCL 600.2169, that Dr. Zakharia's certification in surgery was sufficient. Plaintiff's failure to properly construe the statute's requirements does not satisfy the "reasonable belief" requirement in MCL 600.2912d. Without evidence as to what information and investigation the plaintiff's attorney had performed at the time of the filing of the affidavit, the trial court could not have concluded that plaintiff reasonably believed the expert was qualified under MCL 600.2169.

III. Dismissal with prejudice is appropriate as the statute of limitations has expired as to Dr. Brown.

Plaintiff's failure to file an affidavit of merit which meets the requirements of MCL 600.2912d, including the expert qualification requirements of MCL 600.2169, before the expiration of the statute of limitations merits a dismissal with prejudice as to Dr. Brown.

A. Standard of review.

The granting of a motion for summary disposition, as well as issues of statutory construction are reviewed *de novo*. Herald Co v City of Bay City, 463 Mich 111, 117; 614 NW2d 873 (2000).

B. Since the statute of limitations has expired as to Dr. Brown, he should be dismissed with prejudice.

At the time the motion to strike and for partial summary disposition was filed, the statute of limitations had not yet expired. However, by the time the defendants' supplemental brief was filed with the trial court, the limitations period had ended. Plaintiff had still failed to correct the affidavit of merit deficiency and defendants requested a

dismissal with prejudice (Appendix p 114a).

In Scarsella v Pollak, 461 Mich 547; 607 NW2d 711 (2000), this Court concluded that in a medical malpractice action, both the complaint and the affidavit of meritorious claim must be filed before the expiration of the statute of limitations. If the affidavit of merit and complaint are not timely filed, the matter is properly dismissed with prejudice. See also Barlett v North Ottawa Com Hosp, 244 Mich App 685; 625 NW2d 470 (2001), lv den 465 Mich 907 (2001). However, in Scarsella, this Court declined to address whether the limitation period is tolled by an insufficient affidavit of merit. 461 Mich at 553, n 7. In Kirkaldy v Rim, 251 Mich App 570; 651 NW2d 80 (2002), the Court of Appeals held that dismissal without prejudice was the appropriate sanction when the affidavit was signed by an improper expert, leaving the issue of whether the statute was tolled during the pendency of the complaint to be decided when and if the suit was re-filed.

Defendants request that this Court rule that dismissal here as to Dr. Brown should be with prejudice as the affidavit of merit filed with the complaint was invalid as it was not signed by the proper expert and, as such, that this medical malpractice action was not properly commenced before the expiration of the applicable statute of limitations. To allow a medical malpractice action to be commenced for statute of limitations purposes, without the proper affidavit, and with one that is clearly deficient under both MCL 600.2912d and MCL 600.2169, would directly circumvent the intent of the legislature.

In Scarsella, this Court recognized that in a medical malpractice action the plaintiff must file more than just the complaint to properly commence the action for purposes of the statute of limitations. Citing the use of the word "shall" in the provisions of MCL 600.2912d(1), this Court held that the affidavit of merit is mandatory and imperative. 461 Mich at 549. The Court further held that a medical malpractice complaint without the required affidavit of merit does not toll the period of limitations and that an interpretation otherwise "would undo the Legislature's clear statement that an affidavit of merit "shall"

be filed with the complaint. Id. at 552. Quoting from the Court of Appeals decision, this Court noted:

> Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL § 600.2912d(1); MSA 27A.2912(4)(1), that the plaintiff "shall file with the complaint an affidavit of merit," as well as the legislative remedy of MCL § 2912d(2); MSA 27A.2912d(2), allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint. [Id. at 550.]

In Neal v Oakwood Hospital Corp, 226 Mich App 701, 715; 575 NW2d 68 (1997), the court rejected attempts to circumvent the notice of intent statute in MCL 600.2912b. Plaintiff requested that his suit prematurely filed before the expiration of pre-suit notice period not be dismissed, but simply held stayed for the remaining pendency of the notice period since there was no prejudice to the defendant. The Court of Appeals rejected that contention, stating:

> . . . were we to hold that a plaintiff's noncompliance with § 2912b(1) requires dismissal only if the noncompliance prejudices the defendant, we would be supplying a judicial gloss contrary to the clear statutory language mandating that 'a person *shall not commence* an action alleging medical malpractice. . . not less than 182 days before the action is commenced.' [Id. at 715; emphasis added and emphasis in original].

Allowing an affidavit which is not signed by the proper expert under section 2169 to be proper to commence this medical malpractice action for purposes of the statute of limitations would be supplying a judicial gloss to the clear language of MCL 600.2912d which requires the affidavit to be signed by an expert who meets the requirements of section 2169.

There is no question that the statute of limitations has expired at this time. The date of the alleged negligent act on which the complaint allegations are based was November 9, 1997. Under MCL 600.5805 and MCL 600.5838a, plaintiff was required to

file her suit within two years - on or before November 9, 1999.[8] Under MCL 600.5852, plaintiff could also file her suit within two years of the letters of authority, which were issued on November 5, 1999).[9] Thus, suit was required to be filed on or before November 5, 2001.[10] Plaintiff has never filed an affidavit by a vascular surgeon.[11] The statute of limitations has clearly long since expired. Thus, Dr. Brown should be dismissed with prejudice.

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8 The six month discovery rule under MCL 600.5838a is clearly inapplicable under the facts alleged in the complaint.

9 Although the letters of authority were not attached below, they are a matter of court record. This Court is entitled to take judicial notice of the pleadings and proceedings of the lower courts. MRE 201, People v Snow, 386 Mich 586, 591; 194 NW2d 314 (1972); In re Huff, 352 Mich 402, 412; 91 NW2d 613 (1958).

10 The notice of intent was dated October 13, 2000 (Appendix pp 33a and 44a). Thus, the 182 notice period expired on April 13, 2001, before the running of the death savings provision in section 5852. As a result, a determination does not need to be made as to whether the tolling provisions of MCL 600.5856(d) apply.

11 In plaintiff's supplemental brief filed with the trial court, plaintiff stated that after additional training in vascular surgery, a candidate may receive a certificate of special qualification in vascular surgery and that plaintiff would file an affidavit to this effect signed by Dr. Wayne Gradman (there is no indication in the docket entries that this was filed). Plaintiff claimed that Dr. Gradman holds the same qualifications as Dr. Brown (Appendix p 90a). However, plaintiff did not have Dr. Gradman sign an affidavit of merit to support the claims.

RELIEF REQUESTED

WHEREFORE, Defendants Sinai Hospital and Otto W. Brown, M.D. respectfully request that this Honorable Court reverse the trial court's order denying these defendants' motion to strike and for partial summary disposition and hold that Otto W. Brown, M.D. should be dismissed with prejudice and that the allegations against Sinai Hospital based on care and treatment provided by Dr. Brown should be dismissed. Defendants further request costs and attorney fees.

Respectfully submitted,

TANOURY, CORBET, SHAW & NAUTS

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